

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

HERBERT ROGERS, SR.,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
PERSONNEL),
Appellee.

CASE NO. 92-MA-10

REC'D JUL 16 AM 9 21
PUBLIC EMPLOYMENT
RELATIONS BOARD

RULING ON MOTION TO DISMISS

Diane Tvrdik, Administrative Law Judge. In this case Appellant, Herbert Rogers, Sr. (hereinafter Rogers) appeals from a third-step grievance procedure. Pursuant to §19A.14(2)¹, Rogers originally filed a State Employee Grievance and Disciplinary Action Appeal Form with the Public Employment Relations Board (PERB or Board) on October 14, 1991. The basis for the appeal was a non-contract grievance² which alleged that the Iowa Department of Personnel (State or IDOP) violated IDOP Rule 11.2³ when Rogers

¹All statutory citations, unless otherwise indicated, are to the Iowa Code (1991).

Section 19A.14(2) **Discipline resolution.** A merit system employee . . . who is discharged, suspended, demoted, or otherwise reduced in pay, . . . may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the Public Employment Relations Board. . . . the hearing shall otherwise be conducted in accordance with the rules of the Public Employment Relations Board and the Iowa Administrative Procedures Act. . . .

²Rogers has several outstanding grievances filed with IDOP. IDOP has designated the instant appeal as NC-226.

³Iowa Admin. Code 581-r. 11.2 **Disciplinary Actions.** In addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when based on a standard of just cause: suspension; reduction of pay within the same pay grade; disciplinary demotion; or discharge.

received a written reprimand for his alleged lack of competent performance.

On December 11, 1991, IDOP filed a Motion to Dismiss which was based on the theory that PERB was without subject matter jurisdiction. A hearing on IDOP's motion was held on March 19, 1992, at PERB's office in Des Moines, Iowa. Rogers was represented by William S. Morris and the State was represented by Kristin Johnson. At hearing, Morris moved to amend the State Employee Grievance and Disciplinary Action Appeal Form to reflect an appeal under §19A.14(1),⁴ and Morris reasserted the alleged violation of IDOP Rule 11.2.⁵ The motion to amend was granted. On April 10, 1992, I denied IDOP's Motion to Dismiss.

On July 8, 1992, a hearing was held at PERB offices, Des Moines, Iowa. The purpose of the hearing was to afford the parties a full opportunity to present evidence and legal arguments with regards to the alleged violation of IDOP Rule 11.2 and Chapter 19A. At a pre-hearing conference, attended by both William Morris and

. . . Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, failure to perform assigned duties, inadequacy in the performance of assigned duties, . . . conduct which adversely affects the employee's job performance or the agency of employment, . . . any other just cause.

⁴Section 19A.14(1) (1991) *Grievances*. An employee . . . who has exhausted the available agency steps in the uniform grievance procedure provided for in the department of personnel rules may . . . file the grievance at the third-step with the director. . . .

If not satisfied, the employee may . . . file an appeal with the public employment relations board. The hearing shall be conducted in accordance with the rules of the public employment relations board and the Iowa Administrative Procedures Act. Decisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel.

⁵See, supra, FN 3.

Kristin Johnson, the undersigned administrative law judge advised the parties that the Appellant would proceed first with evidence on the merits of the §19A.14(1) grievance. The parties were further advised that, in a companion case No. 92-MA-09, which was filed under §19A.14(2), Discipline Resolution, the State would proceed first with its case-in-chief. This order of proceeding on the merits of each case is based on my considered opinion that Section 19A.14(2) statutorily defines discipline as limited to a discharge, suspension, demotion or other pay reductions, and it reasonably follows that the State has the burden to go first and has the burden to show just cause in such a proceeding. However, since Section 19A.14(2) does not designate a reprimand as discipline (and a letter of reprimand is the issue in 92-MA-10), Rogers is required to go first with his case-in-chief.

At the hearing on the merits, a motion was made by Herbert Rogers that I change the designated order of procedure. Rogers alleged that Chapter 19A requires the State to proceed first and that the State carries the burden of proof in a non-contract grievance appeal procedure; but Rogers failed to cite any statutory authority for such a position. The State resisted the motion to change the designated order of procedure. The motion was denied.

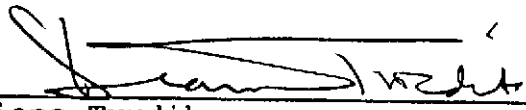
Rogers was then offered the opportunity to present his case-in-chief. Rogers, however, refused to present any evidence, or call any witnesses, unless I reversed my ruling and order the State to proceed first, and carry the burden in the instant case. I again renewed my denial of the motion to change the designated procedural order. The State then moved that the case be dismissed due to the lack of any evidence in the record to support the

allegation that IDOP failed to substantially comply with IDOP Rule 11.2 or Chapter 19A. I again afforded Rogers an opportunity to present his case-in-chief, and to submit evidence, or testimony, regarding the alleged IDOP violation. Rogers renewed his position that my earlier ruling on the motion to change the designated order of procedure was in error, and Rogers refused to present evidence or witnesses on the issue of the reprimand he received, and which he appealed to PERB pursuant to §19A.14(1).

After Rogers was given a third opportunity to present his case-in-chief, I granted the State's motion to dismiss Case No. 92-MA-10.

I hereby renew my previous ruling that is based on a total lack of evidence in the record that IDOP failed to substantially comply with Chapter 19A or IDOP Rule 11.2 when it issued a letter of reprimand to Herbert Rogers, Sr. Accordingly, this case is hereby dismissed in its entirety.⁶

DATED at Des Moines, Iowa this 16th day of July, 1992.


Diane Tvrdik,
Administrative Law Judge

cc: William S. Morris
Kristin H. Johnson

⁶I note for the record that State's witness, Tom Donahue, former Director of the Iowa Department of Personnel, presented testimony on April 12, 1992, in both Case Nos. 92-MA-10 and 92-MA-09. On that date both Morris and Johnson were present and were allowed full opportunity to direct examination and cross-examination. However, I have not relied upon any such testimony in dismissing this case, and base the dismissal of Case No. 92-MA-10 solely on the record as presented on July 8, 1992.